

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

FRED HOLABIRD,

Case No. 3:14-cv-00262-HDM-CBC

Plaintiff,

ORDER

DONALD KAGIN, et al.,

Defendants.

I. REPORT AND RECOMMENDATION

Plaintiff filed a motion for evidentiary hearing to enforce settlement agreement (ECF No. 197), and defendants filed a cross-motion to enforce settlement agreement (ECF No. 208). After an evidentiary hearing, the Magistrate Judge entered her report and recommendation (ECF No. 234), recommending that plaintiff's motion to enforce the settlement agreement be granted, and defendants' cross-motion be denied. Plaintiff filed an objection to the report and recommendation (ECF No. 238), and defendants filed a response (ECF No. 241). Defendants also filed an objection to the report and recommendation (ECF No. 239), and plaintiff filed a response (ECF No. 240).

The court has considered the pleadings and memoranda of the parties and other relevant matters of record and has made a review and determination in accordance with the requirements of 28 U.S.C. § 636 and applicable case law, and good cause appearing, the court hereby **ADOPTS AND ACCEPTS** the report and recommendation of the United States Magistrate Judge (ECF No. 234). The court finds and concludes that the record supports the Magistrate Judge's conclusion that defendants breached the Settlement Agreement with plaintiff, causing plaintiff to incur damages in the amount of \$499, 210.10. Plaintiff's motion to enforce settlement agreement (ECF No. 197) is **GRANTED**, and defendants' cross-motion to enforce settlement agreement (ECF No.

1 208) is **DENIED**. The court enters judgment in this case in favor of plaintiff and against
2 defendants, jointly and severally, in the total amount of \$499,210.10.

3 **II. MOTION FOR ATTORNEY'S FEES**

4 Also before the court is plaintiff's motion for attorney's fees (ECF No. 246). Defendants
5 have opposed (ECF No. 247), and plaintiff has replied (ECF No. 248). Plaintiff seeks an award of
6 fees in the amount of \$101,005.00 and an award of costs in the amount of \$9,161.31.

7 Plaintiff filed his motion pursuant to Federal Rule of Civil Procedure 54. Federal Rule of
8 Civil Procedure 54(d)(1) allows an award of costs to the prevailing party. Federal Rule of Civil
9 Procedure 54(d)(2) sets forth the procedure for obtaining an award of attorney's fees but does not
10 provide the substantive basis for such an award. Fees are recoverable only if there is a rule, statute,
11 or contract that authorizes such an award. *See MRO Commc'ns, Inc. v. Am. Tel. & Tel. Co.*, 197
12 F.3d 1276, 1281 (9th Cir. 1999).

13 Here, plaintiff seeks an award of costs and fees pursuant to Section 18 of a Settlement
14 Agreement ("SA") entered into with defendants. Section 18 reads as follows:

15 **Indemnification.** The Parties hereto agree to indemnify and hold each other and
16 each, every and all of their respective insurers, agents, representative, officers,
17 directors, members, managers, spouses, attorneys, heirs, successors and assigns
18 harmless from and against the aggregate of all expenses, losses, costs, deficiencies,
19 liabilities and damages (including, without limitation, related counsel and paralegal
fees and expenses) incurred or suffered by such indemnified parties resulting from
or arising out of any breach of any of the representations or warranties made by
them in this Agreement.

20 Settlement agreements are governed by the law of the forum state. *United Commercial*
21 *Ins. Serv. Inc. v. Paymaster Corp.*, 962 F.2d 853, 856 (9th Cir. 1992). Under Nevada law, "a
22 settlement agreement is a contract, [and] its construction and enforcement are governed by
23 principles of contract law." *May v. Anderson*, 121 Nev. 668, 672 (119 P.3d 1254, 1257 (Nev.
24 2005). "Unlike most contracts, indemnification agreements are strictly construed and will not be
25 held to provide indemnification unless it is so stated in clear and unequivocal language." *Casun*
26 *Invest, A.G. v. Ponder*, No. 2:16-cv-2925-JCM-GWF, 2018 WL 6413161 at *2 (D. Nev. Dec. 6,
27 2018) (citing *George L. Brown Ins. v. Star Ins. Co.*, 237 P.3d 92, 97 (Nev. 2010)).

1 Plaintiff argues that the plain meaning of the indemnity provision provides for attorney's
2 fees if any party breaches any of the representations made in the agreement. Defendants argue
3 that the Indemnity Clause only applies to representations and warranties and neither section of the
4 SA that plaintiff alleges were breached are representations or warranties. The court concludes that
5 the language of Section 18 of the SA plainly states that the breaching party, in this case the
6 defendants, will be responsible for all counsel and paralegal fees and expenses incurred out of any
7 breach of any of the representations or warranties made in the SA. Here, the Magistrate Judge
8 clearly found, and the court adopts the recommendation, that the defendants breached material
9 terms and conditions of the SA, specifically that defendants breached Sections 9.1 and 9.2 of the
10 SA. Defendants' conduct in breaching the terms of the SA by breaching the representation in the
11 SA that defendants would make monthly payments of \$12,500.00 and breaching the representation
12 that defendants would provide \$200,000.00 worth of Americana based on prices paid by plaintiff
13 when he was an employee of HK, clearly falls under the umbrella of the indemnity clause of the
14 SA, the terms of which are clear and unequivocal. Plaintiff is therefore entitled to an award of
15 fees and costs pursuant to Section 18 of the SA.

16 In making an award of attorney's fees, the court begins by calculating the "lodestar."
17 *Caudle v. Bristow Optical Co., Inc.*, 224 F.3d 1014, 1028 (9th Cir. 2000). The lodestar is reached
18 by multiplying the number of hours the prevailing party reasonably expended on the litigation by
19 a reasonable hourly rate. *Id.* In determining the hours to be included in the lodestar, the court
20 should exclude hours that are "excessive, redundant, or otherwise unnecessary." *McCown v. City*
21 *of Fontana*, 565 F.3d 1097, 1102 (9th Cir. 2009).

22 In most cases, the lodestar is presumptively a reasonable fee award. *Ferland v. Conrad*
23 *Credit Corp.*, 244 F.3d 1145, 1149 n.4 (9th Cir. 2001). However, if the circumstances warrant,
24 the court may "adjust the lodestar to account for other facts that are not subsumed within it." *Id.*
25 Those factors are:

- 26 (1) the time and labor required; (2) the novelty and difficulty of the questions
27 involved; (3) the skill requisite to perform the legal service properly; (4) the
28 preclusion of other employment by the attorney due to acceptance of the case; (5)
the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations
imposed by the client or the circumstances; (8) the amount involved and the results

1 obtained; (9) the experience, reputation, and ability of the attorneys; (10) the
2 “undesirability” of the case; (11) the nature and length of the professional
3 relationship with the client; and (12) awards in similar cases.

4 *Cairns v. Franklin Mint. Co.*, 292 F.3d 1139, 1158 (9th Cir. 2002) (citing *Kerr v. Screen Extras*
5 *Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975)). “The court need not consider all factors – only those
6 called into question by the case at hand and necessary to support the reasonableness of the fee
7 award.” *Cairns*, 292 F.3d at 1158 (citing *Kessler v. Assocs. Fin Servs. Co. of Hawaii*, 639 F.2d
8 498, 500 n. 1 (9th Cir. 1981).

9 Plaintiff’s counsel seeks an hourly rate of \$450.00 per hour for himself and \$125.00 for his
10 paralegal. Defendants make no argument as to the reasonableness of the hourly rates. The court
11 concludes that these hourly rates are reasonable and customary hourly rates for the type of work
12 performed in this case. Counsel seeks compensation for 208.4 hours of work for himself and 57.8
13 hours of work for his paralegal. Defendants make no argument as to the reasonableness of
14 counsel’s hours. The court concludes that the hours of work expended are reasonable in light of
15 the extensive briefing and hearings conducted in relation to this case.

16 The court finds that all hours and the hourly rate submitted by counsel for compensation
17 are reasonable. Therefore, the lodestar in this case is \$101,005.00, representing 208.4 hours of
18 work at \$450.00 per hour and 57.8 hours of work at \$125.00 per hour.

19 Accordingly, plaintiff’s motion for attorney’s fees and costs (ECF No. 246) is **GRANTED**.
20 Plaintiff is awarded attorney’s fees in the amount of \$101,005.00.

21 **III. CONCLUSION**

22 In accordance with the foregoing, it is ordered that the court hereby **ADOPTS AND**
23 **ACCEPTS** the report and recommendation of the Magistrate Judge (ECF No. 234). Plaintiff’s
24 motion to enforce settlement (ECF No. 197) is **GRANTED**, and defendants’ cross-motion to
25 enforce settlement agreement (ECF No. 208) is **DENIED**. The court enters judgment in this case
26 in favor of plaintiff and against defendants, jointly and severally, in the total amount of
27 \$499,210.10.

28 It is further ordered that plaintiff’s motion for attorney’s fees and costs (ECF No. 246) is
29 **GRANTED** and plaintiff is awarded attorney’s fees in the amount of \$101,005.00.

1 It is further ordered that the Clerk of the Court shall tax the memorandum of costs attached
2 to plaintiff's motion for attorney's fees (ECF No. 246-1 at 33-57).

3 It is further ordered that the Clerk of the Court shall enter a judgment in favor of the plaintiff
4 and against the defendants in the amount of \$499,210.10 together with attorney's fees in the
5 amount of \$101,005.00 and taxable costs.

IT IS SO ORDERED.

DATED: This 17th day of April, 2019.

Howard D McElhaney

UNITED STATES DISTRICT JUDGE